



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R7–ES–2011–0109]**

**[4500030113]**

**RIN 1018–AY34**

### **Endangered and Threatened Wildlife and Plants; Reissuance of Interim Special Rule for the Polar Bear**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** On November 18, 2011, the United States District Court for the District of Columbia (Court) issued an order in regard to Misc. No. 08–764 (EGS) MDL Docket No. 1993 IN RE: POLAR BEAR ENDANGERED SPECIES ACT LISTING AND §4(d)

RULE LITIGATION, vacating and remanding to the U.S. Fish and Wildlife Service the December 16, 2008, final special rule for the polar bear (73 FR 76249). The Court further ordered that in its place the interim final special rule for the polar bear published on May 15, 2008 (73 FR 28306), shall remain in effect until superseded by the new special rule for the polar bear to be published in the **Federal Register**. This rule complies with that order and provides final notice of the reinstatement of the May 15, 2008, interim final special rule for the polar bear.

**DATES:** This action is effective [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** The interim final special rule is available on the Internet at <http://www.regulations.gov>. It will also be available for inspection, by appointment, during normal business hours at the Marine Mammal Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage Alaska; telephone (907) 786–3800.

**FOR FURTHER INFORMATION CONTACT:** For information on the polar bear and its habitat see <http://alaska.fws.gov/fisheries/mmm/polarbear/esa.htm> or contact U.S. Fish and Wildlife Service, Marine Mammals Management (see **ADDRESSES**) or telephone (907) 786–3800. Individuals who are hearing impaired or speech-impaired may call the Federal Relay Service at 1–800–877–8337 for TTY assistance.

**SUPPLEMENTARY INFORMATION:**

## Background

On May 15, 2008, we, the U.S. Fish and Wildlife Service (Service), published a final rule listing the polar bear (*Ursus maritimus*) as a threatened species throughout its range under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (ESA) (73 FR 28212). At the same time the Service published this listing rule, we also published an interim final special rule for the polar bear under authority of section 4(d) of the ESA that provides measures that are necessary and advisable for the conservation of the polar bear; this interim rule was later finalized on December 16, 2008 (73 FR 76249). Lawsuits challenging both the May 15, 2008, listing of the polar bear and the December 16, 2008, final special rule for the polar bear were filed in various federal district courts. These lawsuits were consolidated before the Court.

On October 17, 2011, the U.S. District Court for the District of Columbia found the Service violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act by failing to conduct a NEPA analysis for its December 16, 2008, final special rule for the polar bear. The Court ordered the final special rule vacated and set aside pending resolution of a timetable for NEPA review. On November 18, 2011, the Court resolved the schedule for NEPA review and vacated the December 16, 2008, final special rule (*Ctr. for Biological Diversity, et al. v. Salazar, et al.*, No. 08-2113; *Defenders of Wildlife v. U.S. Dep't of the Interior, et al.*, No. 09-153, Misc. No. 08-764 (EGS) MDL Docket No. 1993). In vacating and remanding to the U.S. Fish and Wildlife Service the December 16, 2008, final special rule for the polar bear (73 FR 76249), the Court further ordered that, in its place, the interim final special rule for the polar bear published on May 15, 2008 (73 FR 28306), shall remain in effect until

superseded by the new special rule for the polar bear to be published in the **Federal Register**. This rule revises the Code of Federal Regulations to reflect the November 18, 2011, court order and is effective today. However, the court order reinstating the May 15, 2008, interim final special rule for the polar bear had legal effect immediately; as a result the interim final special rule has been in effect since November 18, 2011.

The interim final special rule provides that if an activity is authorized or exempted under the Marine Mammal Protection Act (MMPA) or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Service would not require any additional authorization under the Service's regulations to conduct the activity. However, if the activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under 50 CFR 17.31, the prohibitions of § 17.31 apply and the Service would require authorization under 50 CFR 17.32. In addition, otherwise lawful activities within the United States (except for Alaska) that cause incidental take of polar bears are exempt from the provisions of § 17.31.

#### **Administrative Procedure**

This rulemaking is necessary to comply with the October 17, 2011, and November 18, 2011, U.S. District Court for the District of Columbia orders. Therefore, under these circumstances, the Director has determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and

unnecessary. The Director has further determined, pursuant to 5 U.S.C. 553(d)(3), that the agency has good cause to make this rule effective upon publication.

### **Effects of the Rule**

As of November 18, 2011, the interim final rule for the polar bear published on May 15, 2008 (73 FR 28306), is reinstated throughout the species' range (50 CFR 17.40(q)). Please see the above-cited **Federal Register** publications for more detailed information regarding the polar bear listing and the special rule. This rule does not affect the critical habitat designation for the polar bear that became effective January 6, 2011 (75 FR 76086, December 7, 2010). Moreover, this rule will not affect the status of the polar bear under State laws or suspend any other legal protections provided by State law.

### **Lists of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Regulation Promulgation**

Accordingly, in order to comply with the court orders discussed above, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below.

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245;  
Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.40 by revising paragraph (q) to read as follows:

**§ 17.40 Special rules—mammals.**

\* \* \* \* \*

(q) Polar bear (*Ursus maritimus*).

(1) Except as noted in paragraphs (2) and (4) of subsection (q) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 of this part apply to the polar bear.

(2) None of the prohibitions in § 17.31 of this part apply to any activity conducted in a manner that is consistent with the requirements of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 et seq., and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), provided that the person carrying out the activity has complied with all terms and conditions that apply to that activity under the provisions of the MMPA and CITES and their implementing regulations.

(3) All applicable provisions of 50 CFR parts 14, 18, and 23 must be met.

(4) None of the prohibitions in § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within any area subject to the jurisdiction of the United States except Alaska.

Dated: January 19, 2012

Rachel Jacobson

*Acting Assistant Secretary for Fish and Wildlife and Parks*

Billing Code: 4310–55

**[FR Doc. 2012-1914 Filed 01/27/2012 at 8:45 am; Publication Date: 01/30/2012]**